Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Restoring Internet Freedom	)	WC Docket No. 17-108
	)	
	)	

RESPONSE TO OPPOSITIONS TO MOTION OF INCOMPAS TO MODIFY PROTECTIVE ORDERS

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INCOMPAS hereby responds to oppositions by AT&T Services, Inc. ("AT&T"), Charter Communications, Inc. ("Charter") and Comcast Corporation ("Comcast") (collectively, "Opposing Parties")[1] to INCOMPAS's Motion to allow critical information from prior transaction reviews to be used in this proceeding. INCOMPAS's Motion is necessary to the Commission's inquiry, meets the standard established by *CBS Corp.*, and is structured to ensure full protection of confidential and highly confidential information.

I. INTRODUCTION AND SUMMARY

The impetus behind INCOMPAS's request is straightforward—compiling a complete record from evidence already available to the Commission while according the full confidentiality protections such information warrants. Opposing Parties paint an apocalyptic portrait of doomsday scenarios and dystopic outcomes. The reality is that the Commission has made the question of the incentives and abilities of the broadband

[1] Comcast Corporation's Opposition to Motion of INCOMPAS to Modify Protective Orders, WC Docket No. 17-108 (July 27, 2017) ("Comcast Opposition"); Opposition of AT&T Services, Inc. to Motion of INCOMPAS to Modify Protective Orders, WC Docket No. 17-108 (July 27, 2017) ("AT&T Opposition"); Charter Communications, Inc.'s Opposition to Motion of INCOMPAS to Modify Protective Orders, WC Docket No. 17-108 (July 27, 2017) ("Charter Opposition").

providers to harm the openness of the Internet a central question—perhaps the central question—in this proceeding and the Opposing Parties have flooded the Commission with their depiction of broadband providers that lack either the incentive or ability to create such harm to consumers and competition. The requested information, from formal transaction proceedings conducted by the Commission that looked squarely at the incentives and abilities of broadband providers to harm the open Internet, is data that speaks directly to the critical issue on which the Commission has requested comment and is absolutely necessary to test the credibility and persuasiveness of the claims made by the broadband providers. Their absence would deprive the Commission and interested commenters of the ability to comment fully and render the record incomplete. It is why INCOMPAS requests the Commission to consider, and to make available with appropriate safeguards, certain confidential and highly confidential information. And contrary to Opposing Parties' scattershot claims, the request accords with Commission precedent and complies with the spirit of prior protective orders. Granting INCOMPAS's Motion would contribute to the debate and further the public interest.

II. THE REQUESTED INFORMATION IS NECESSARY TO THE COMMISSION'S INQUIRY

INCOMPAS's carefully-drawn request seeks information that is at the heart of the Commission's inquiry and is necessary for the establishment of an adequate record and is equally necessary in order to give the Commission the benefit of differing views that are

tested against critically-important evidence. It is made especially important because of the skepticism expressed by members of the Commission about past economic analysis.[2]

The *NPRM*[3] looks at the history of broadband providers' abilities and incentives to judge the potential for future harm in a world in which the 2015 protections would not exist.[4] The requested information is an integral part of that history. This is the usual way that consideration of future government actions proceeds—by examining the past and, by that consideration, calculating the risk for the future. It must be true that a pattern of conduct (whether good or bad) is a critical part of any predictive process. This is particularly important here because the *NPRM* adopts a strong point of view, expressing substantial skepticism about broadband providers' incentives and abilities to engage in conduct contrary to the open Internet rules[5] and proposes conclusions reflecting the

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[2] *See, e.g.*, Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd. 5601, 5923 (2015) ("*2015 Open Internet Order*") (Pai, dissenting) ("To apply outmoded economic thinking to the Internet marketplace would just hurt consumers, especially the middle-class and low-income Americans who are the biggest beneficiaries of these plans."); *id*. at 4508 (O'Rielly, dissenting) ("I dissented from that prior decision because I was not persuaded, based on the record before us, that there was evidence of harm to businesses or consumers that warranted the adoption of net neutrality rules, much less the imposition of heavy handed Title II regulation on broadband providers.").

[3] Restoring Internet Freedom, *Notice of Proposed Rulemaking*, 32 FCC Rcd. 4434 (2017) ("*NPRM*").

[4] *Id*. at 4460 ¶¶ 77-78, 4461 ¶ 84.

[5] *See, e.g.*, *NPRM* at 4460 ¶ 77 ("How have marketplace developments impacted the incentive and ability, *if any*, of broadband Internet access service providers to engage in conduct that is contrary to the four Internet Freedoms?") (emphasis added); *id.* at 4462 ¶ 85 ("The ban on paid prioritization did not exist prior to the *Title II Order* and even then the record evidence confirmed that no such rule was needed since several large Internet service providers made it clear that that they did not engage in paid prioritization and had no plans to do so."). *But see Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), Oral Arg. Tr. at 31 ("I'm authorized to state by my client [Verizon] today that, but for these rules, we would be

absence of such incentives and abilities.[6] Both contradict prior Commission conclusions.[7] Consequently, it is important for the Commission to consider the full scope of information that it possesses and to look at that evidence fully as it considers whether to reverse course and overrule past Commission judgments.

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exploring those commercial arrangements, but this order prohibits those, and in fact would shrink the types of services that will be available on the Internet."); *2015 Open Internet Order*, 30 FCC Rcd. at 5601, 5604-05 ¶ 8 n.6.

[6] *See NPRM*, 32 FCC Rcd. at 4460 ¶ 78 ("The Commission partially justified the 2015 rules on the theory that the rules would prevent anti-competitive behavior by ISPs seeking to advantage affiliated content. With the existence of antitrust regulations aimed at curbing various forms of anticompetitive conduct, such as collusion and vertical restraints under certain circumstances, we seek comment on whether these rules are necessary in light of these other regulatory regimes."). This inquiry into the adequacy of antitrust law cannot be fairly answered without careful scrutiny of the historical practices and strategies of broadband providers.

[7] *See, e.g.*, *2015 Open Internet Order*, 30 FCC Rcd. at 5628 ¶ 78 ("[B]roadband providers (including mobile broadband providers) have the economic incentives and technical ability to engage in practices that pose a threat to Internet openness by harming other network providers, edge providers, and end users."); *id*. at 5629 ¶ 80 ("As the Commission and the court have recognized, broadband providers are in a position to act as a 'gatekeeper' between end users' access to edge providers' applications, services, and devices and reciprocally for edge providers' access to end users. Broadband providers can exploit this role by acting in ways that may harm the open Internet, such as preferring their own or affiliated content, demanding fees from edge providers, or placing technical barriers to reaching end users."); *id*. at 5630 ¶ 80 n.130 ("We find, for example, that even though edge providers may possess bargaining power, they do not have the same ability as broadband providers to control the flow of traffic or block access to the Internet.") (citing to Preserving the Open Internet, *Report and Order*, 25 FCC Rcd. 17905, 17918 ¶ 24 & n.66 (2010)); Applications of Charter Communications, Inc., Time Warner Cable, Inc. and Advance/Newhouse Partnership For Consent to Assign or Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 31 FCC Rcd. 6327, 6386 ¶ 122 (2015) ("*Charter/TWC Order*") ("[W]e further find that New Charter will have the ability and incentive to discriminate against OVDs via the interconnection market. New Charter will have greater ability to discriminate against OVDs because it will have greater control over interconnection access to its network, as discussed above. Moreover, OVDs are more vulnerable to interconnection-related harms than most other edge providers because of their intensive networking demands. Our economic analysis supports our conclusion that New Charter will have specific incentive and ability to discriminate against OVDs via interconnection.").

Simply put, the Motion suggests that past may be prologue. Looking to the past is the standard way for administrative agencies to make predictive judgments, and the Commission should do so here.[8] There is an important difference between circumstances in which there have been past threats and circumstances in which there have been none when assessing future threats. Here, the evidence is particularly probative: in the past decade the Commission (and the Department of Justice) has expressly and repeatedly determined that broadband providers have the incentives and abilities to act against an open Internet, even during a time when the Commission's rules, or the threat of adoption of such rules, acted as a deterrent from acting on these incentives and abilities. Charter claims that the requested material is nothing more than "factual context for the questions before the Commission,"[9] while AT&T says it would add "nothing of value."[10] But the information sought here represents data from companies that control over 65% of the broadband market.[11] That information is vitally important to the Commission's inquiry, as it has made strong and repeated conclusions about the incentives and abilities of broadband providers to

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[8] *See BellSouth Telecommunications, Inc. v. FCC*, 469 F.3d 1052, 1060 (D.C. Cir. 2006) ("It is certainly true that an agency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to particularly deferential review, as long as they are reasonable. That said, the deference owed agencies' predictive judgments gives them no license to ignore the past when the past relates directly to the question at issue.") (internal quotations and citations omitted).

[9] Charter Opposition at 2.

[10] AT&T Opposition at 13.

[11] *Number of Broadband Internet Subscribers in the United States from 2011 to 2017 by Cable Providers*, Statista, https://www.statista.com/statistics/217348/us-broadband-internet-susbcribers-by-cable-provider/ (last visited Aug. 2, 2017); Jon Brodkin, *Comcast and Charter May Soon Control 70% of 25Mbps Internet Subscribers*, Ars Technica (Jan. 26, 2016), https://arstechnica.com/information-technology/2016/01/comcast-and-charter-may-soon-control-70-of-25mbps-internet-subscriptions/.

discriminate against edge providers. It cannot now abandon those conclusions without going back to review the factual underpinnings that supported them.

Moreover, the most basic notion of justice permits the use of past statements to impeach current claims—a principle applied in the past by the Commission itself.[12] In this case, the entities whose past and future conduct shapes the entire inquiry—broadband providers—are making sweeping statements about the ability of the entire Internet ecosystem to trust them while trying to shelter the realities of their own actual strategy and conduct from the Commission and the public. INCOMPAS has identified four categories of confidential or highly confidential information that should be allowed here, and while they are all necessary, they are distinct: (i) unredacted versions of the Commission's orders; (ii) underlying confidential or highly confidential information that the Commission cited and therefore relied upon in the orders; (iii) economic studies submitted by the applicants and all commenting parties, including full transcripts of any economic fora, such as the ones conducted in Comcast/TWC and Comcast/NBCU; and (iv) documents and materials requested by the Commission of the nature of so-called 4(c) documents[13] that

[12] Fed. R. Evid. 613(b) (allowing admission of extrinsic evidence of a witness's prior inconsistent statement "if justice so requires."); Notice of Apparent Liability for Forfeiture of Mulzer Enterprises, Inc., *Memorandum Opinion and Order,* 14 FCC Rcd. 10495, 10497 ¶ 6 (1999) (considering petitioner's prior inconsistent statement submitted to the Commission in denying petition for reconsideration). *See also* Bloomberg, L.P. v. Comcast Cable Comm'cns, *Memorandum Opinion and Order*, 28 FCC Rcd. 14346, 14366 ¶ 38 (2013) (discussing Comcast's inconsistent statements in another proceeding).

[13] Section 4(c) of the Hart-Scott-Rodino form for pre-merger notification of the antitrust agencies calls for documents prepared by or for officers or directors used to evaluate or analyze the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets. Because only the Charter information request phrased a specification in terms of that section, the Motion

directly relate to the topics raised in the *NPRM*. Opposing Parties make no attempt to distinguish among these categories and instead resort to sweeping statements that are heavy on fearmongering but light on substance.[14] They do not even explain why, for example, an unredacted version of the Commission's own order, which is the formal manner in which the Commission explains its reasoning, not just for purposes of the pending transaction but also to inform the future, should not be made available under a strictly-enforced protective order where, as here, the weight and validity of the conclusions are under fierce attack from the broadband providers and where, therefore, the evidentiary support for the conclusions will demonstrate, in movant's view, their continuing importance.

The Commission has an obligation under the APA to create a complete record.[15] Failing to do so would constitute reversible error.[16] In this case, the information requested

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describes those documents as phrased in terms of other transactions but the intent is the same.

[14] AT&T Opposition at 7 ("[T]here is an extremely high likelihood that competitively sensitive materials will be publicly disclosed"); Charter Opposition at 5 ("If certain parties' highly confidential and confidential information from prior transaction proceedings were to become widely available to commenters in this proceeding, those parties would face a serious risk that their information would be misused"); Comcast Opposition at 7 ("[T]he the real intent of [INCOMPAS's] Motion is to complicate and impede this rulemaking by injecting vast amounts of confidential trade secrets from unrelated transaction reviews that have no legitimate place here.").

[15] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30-31 (1983) (holding that agencies "must examine the relevant data," and the reviewing court "must consider whether the decision was based on a consideration of the relevant factors"); *see also Nat'l Black Media Coal. V. FCC*, 775 F.2d 342, 356 (D.C. Cir. 1985) ("[a]n agency has the duty to examine all 'relevant data'").

[16] *Black Warrior Riverkeeper, Inc. v. US Army Corp. of Engineers*, 781 F.3d 1271, 1291 (11th Cir. 2015).

is at the heart of the inquiry, and the Commission must include the data in a properly protected fashion.[17] Failure to do so would create an incomplete and inadequate record.[18]

The specific circumstances of this proceeding make use of the information requested even more important. The current Commission majority does not agree with the approach taken by its predecessor.[19] It also did not agree with the handling of some of the past mergers.[20] So it is even more necessary for the current Commission to have not just the conclusions but also the underlying facts to examine, aided by comments and analyses.

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[17] *State Farm*, 463 U.S. at 43 (holding that agency rule is arbitrary and capricious if the agency fails to consider an important aspect of the problem).

[18] *People of State of Cal. v.* FCC, 4 F.3d 1505, 1511 (9th Cir. 1993) ("[I]f the record reveals that the agency has failed to consider important aspects of a problem or has offered an explanation for its decision that runs counter to the evidence before it, the court must find the agency in violation of the APA.") (internal quotations removed).

[19] *2015 Open Internet Order*, 30 FCC Rcd. at 5921 (Pai, dissenting) ("In short, because this *Order* imposes intrusive government regulations that won't work to solve a problem that doesn't exist using legal authority the FCC doesn't have, I dissent."); *id.* at 5985 (O'Rielly, dissenting) ("While I see no need for net neutrality rules, I am far more troubled by the dangerous course that the Commission is now charting on Title II and the consequences it will have for broadband investment, edge providers, and consumers . . . I cannot support this monumental and unlawful power grab.").

[20] *Charter/TWC Order*, 31 FCC Rcd. at 6668-70 ("*Charter/TWC Order*") (Pai, dissenting) ("[the] Order is another significant step away from the free-market policies that Democrat- and Republican-led FCCs alike applied for decades . . . In sum, I do not believe that the adoption of this Order is in the interest of the American people. I therefore dissent."); *id.* at 6664 (O'Rielly, dissenting) ("Under the conditions imposed by this Order, New Charter will be carrying a daunting regulatory load from its inception. In an ostensibly free-market economy, no enterprise should ever be hamstrung at the starting line in such a manner, but it is my hope that the company will be able to overcome the onerous burden laid on by a command-and-control Commission and deliver innovative new offerings to Americans.").

III. USE OF THE REQUESTED INFORMATION MEETS THE STANDARD OF *CBS CORP.* AND FURTHERS THE SOUND ADMINISTRATION OF JUSTICE

The Trade Secrets Act[21] does not bar admitting into the record the material specified in INCOMPAS's Motion. Opposing Parties cite the Trade Secrets Act as if invoking it will prevent use of information that Opposing Parties themselves have already submitted for review by third parties under the Commission's protective orders. Nor does the request run counter to the D.C. Circuit's decision in *CBS Corp. v. FCC*.[22]

Assuming that at least some of the information designated as "highly confidential" qualifies as a trade secret, the D.C. Circuit held that the Trade Secrets Act does not bar the release of sensitive business secrets.[23] As Charter correctly recognizes, the Commission has the authority to "release information subject to the Trade Secrets Act in particular contexts."[24] Consequently, the Trade Secrets Act does not bar the Commission from making even highly sensitive information available for review via its protective orders. *CBS Corp*. was about the failure of the Commission to make the requisite showing that disclosure was *necessary*; it did not hold that the Commission could *never* make the showing.[25] In other

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[21] 18 U.S.C. § 1905.

[22] *CBS Corp. v. FCC*, 785 F.3d 699 (D.C. Cir. 2015). As an initial matter, not all of the information requested by INCOMPAS is a "trade secret" of Opposing Parties. As Opposing Parties recognize, INCOMPAS request includes both confidential and highly confidential information. By definition, since confidential information was shared with inside counsel of Opposing Parties' competitors, it cannot be a "trade secret." If Opposing Parties have concerns about specific categories of information, then they can and should raise objections to releasing that information with the Commission rather than making a wholesale objection to all of INCOMPAS's request.

[23] *Id*. at 707.

[24] Charter Opposition at 3 n.7.

[25] *CBS Corp.*, 785 F.3d at 707 ("In short, *by failing to explain why* VPCI is a 'necessary link in a chain of evidence that will resolve an issue before the Commission,' the Commission has

words, in *CBS Corp.*, the Commission concluded that the desired information was *relevant* but failed even to attempt to establish that the information was *necessary*.[26] This is where the Commission erred, as the D.C. Circuit made clear.[27] The D.C. Circuit concluded that the information under dispute in *CBS Corp*. was relevant, important and even central.[28] However, it faulted the Commission for not going the next step and demonstrating that the information was *necessary* for the Commission's review.[29] If the Commission had successfully made that showing, it would not have risked violating the Trade Secrets Act. Here, the information is more than necessary for the Commission and third parties to properly understand the incentives, abilities, and threats to the open Internet. Employing the phrasing of the court itself, the information is required as a necessary link in the chain of evidence.[30] For instance, the *NPRM* has asked whether the Commission should relinquish regulatory authority over interconnection.[31] The Commission in the Charter/TWC merger specifically imposed conditions on the merger based on redacted economic analysis that absent the conditions, New Charter would have incentive to charge more for

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failed to overcome its—and Congress's—presumption against disclosure of confidential information. We shall therefore vacate the Commission's Order.") (emphasis added).

[26] *Id*. at 707 ("In order to vindicate the goals of the Trade Secrets Act, the Commission will refuse to disclose confidential documents unless it has a good reason to do so—namely, that it would benefit from third-party comment on information that is *necessary to the review process*.").

[27] *Id*. at 705 ("But the Commission falters at the last requirement: the confidential information must be necessary to the Commission's review process.").

[28] *Id*. at 707.

[29] *Id*. ("But to justify disclosure, the information must be 'necessary' to the Commission's review process.").

[30] *Id*. at 705.

[31] *NPRM*, 32 FCC Rcd. at 4444 ¶ 42.

interconnection.[32] Considering that economic study is a necessary link in the chain of evidence for whether the Commission should relinquish its jurisdiction over interconnection agreements. As INCOMPAS has demonstrated, the Commission itself has made understanding the incentives and abilities of broadband providers to harm edge providers the necessary question that must be answered to justify the open Internet rules.[33]

Opposing Parties' arguments about *CBS Corp.* are similarly misplaced. For example, AT&T claims that there can be no cognizable benefits to bringing in this information because the information is one-sided and outdated.[34] Leaving aside how it believes *its own documents* can be one-sided as used to consider the credibility of its own statements, the cognizable benefits are obvious: developing the rich record that the Commission appears to believe was missing in the previous open Internet proceedings and is necessary to the Commission's decision whether to reverse the application of Title II and abolish some or all of the current open Internet rules.

This proceeding is the kind of place where economic theory meets evidence. Consider the evidence discussed in the economist declarations submitted on July 17, 2017 by AT&T and Comcast (Charter did not submit such a declaration). These declarations did exactly what the Motion asks the Commission to do—examine the past to understand the future. The AT&T report looks at incidents at least as far back as 2005—years earlier than

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[32] *Charter/TWC Order*, 31 FCC Rcd. at 6378 ¶ 103.

[33] *NPRM*, 32 FCC Rcd. at 4460 ¶ 77 ("How have marketplace developments impacted the incentive and ability, *if any*, of broadband Internet access service providers to engage in conduct that is contrary to the four Internet Freedoms?") (emphasis added).

[34] AT&T Opposition at 11.

documents that it now claims are too old to be considered.[35] The economists made very broad statements that there is "no evidence" to support the concern that broadband providers might engage in the kind of conduct that the current rules are designed to prevent and this is important. The assertion is not that there is some, or inadequate or contested evidence, perhaps because the Opposing Parties understand the difficulties they would face in asking for the abolition of open Internet requirements if there were even doubt as to whether the future of the Internet ecosystem could be safely left in their hand without the current protections.[36] But the plain fact is that there is evidence and it is that evidence that the Motion requests the Commission consider. That the Commission made public findings does not answer the question. Those conclusions are important; they conclusively show the incentives and abilities that broadband providers have to curb openness. But this Commission's consideration of their persuasive value in this proceeding will necessarily include examination of the evidentiary foundation that the record supplied for the findings. That is exactly what INCOMPAS seeks to demonstrate, that the factual depictions of the opponents of the current regulatory framework are contrary to the reality of the marketplace.

This request meets the *CBS Corp.* standard because the Commission itself has made the central and necessary question of this proceeding whether the open Internet should be

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[35] Declaration of Mark A. Israel, Allan L. Shampine & Thomas A. Stemwedel at 6 (attached to Comments of AT&T, WC Docket No. 17-108 (July 17, 2017)) ("AT&T Economists Declaration"); *see also* Exhibit A (including discussion of documents from 2010, 2012 and 2014).

[36] *Id.*

protected from the incentives and abilities of broadband providers to harm competition.[37] Consequently, it is necessary for the Commission to evaluate whether these companies have the incentives and abilities to violate the existing open Internet rules. In the prior investigations at issue, the Commission determined, based on the companies' own internal documents and economic reports, that they do have such incentives and abilities. The below chart provides illustrative examples, showing where the Commission relied on redacted information (a more extensive chart is attached as Exhibit A):

	Opposing Parties' Views as Contained in their Merger Applications and in this Proceeding	**Commission and DOJ Conclusions**
Comcast	• "The combined company will not have the ability or incentive to benefit its distribution businesses by discriminating against rival online video distributors." Application of Comcast/NBCU at 122, MB Docket No. 10-56. • "As Comcast explained in its 2014 comments, '[i]f a provider were to block or degrade Internet applications or content, the provider would incur substantial subscriber losses and reputational harm.'" Comcast Comments at 63, WC Docket No. 17-108.	• "[E]ven today OVDs may provide some competition for Comcast and affect the prices it charges consumers. For example, an OVD that rents or sells movies competes against Comcast's pay-per-view movie service and, hence, competes with Comcast for revenue. **[REDACTED]** Comcast therefore has an incentive to deny that OVD access to NBCU content, including movies distributed by Universal Studios. If consumers have a choice for some of Comcast's services at a lower price, Comcast may be forced to lower its price in order to keep those customers." Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc. for Consent to Assign Licenses and

[37] *NPRM*, 32 FCC Rcd. at 4460 ¶ 77 ("How have marketplace developments impacted the incentive and ability, *if any*, of broadband Internet access service providers to engage in conduct that is contrary to the four Internet Freedoms?") (emphasis added).

		Transfer Control of Licenses, *Memorandum Opinion and Order*,26 FCC Rcd. 4238, 4270 ¶ 81 (2011) (citing redacted information in footnotes 177 and 178) ("*Comcast/NBCU Order*"). • "Comcast has an incentive to encumber, through its control of the JV, the development of nascent distribution technologies and the business models that underlie them by denying OVDs access to NBCU content or substantially increasing the cost of obtaining such content. . . . Comcast's incentives and ability to raise the cost of or deny NBCU programming to its distribution rivals, especially OVDs, will lessen competition in video programming distribution." Complaint, *United States v. Comcast Corp., et al.*, Case No. 1:11-cv-00106, 21-22 ¶ 54 (D.D.C. Jan. 18, 2011) ("*Comcast/NBCU DOJ Complaint*").
AT&T	• "In addition to improving broadband access for millions of Americans, the broadband expansion also will benefit OTT providers like Netflix, Amazon, Google, and Hulu, which depend on consumers having access to quality broadband connections." Application of AT&T at 40, MB Docket No. 14-90. • "Because the Title II Order could cite no credible evidence of any relevant market failure, it resorted to abstract economic speculation about market conditions that might theoretically imperil Internet openness someday." AT&T Comments at 21, WC Docket No. 17-108.	• "We find that as the combined entity expands its online offerings, it will have an increased incentive to limit subscriber demand for competitors' online video content, including through data caps that discriminate against third-party content by exempting its own content from the data cap. Indeed, AT&T's internal documents indicate that [BEGIN HIGHLY CONF. INFO.] [END HIGHLY CONF. INFO.]." Applications of AT&T Inc. and DIRECTV for Consent to

		Assign or Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order, 30 FCC Rcd. 9131, 9210 ¶ 210 (2015) ("*AT&T/DIRECTV Order*").
Charter	• "New Charter will lack the ability to adversely impact OVDs' abilities to compete . . . as well as the incentive to do so." Application of Charter at 44, MB Docket No. 15-149. • "Consistent with Charter's pro-customer and pro-broadband approach, we have long put the principles of an open internet into practice in our own business. We do not block, throttle, or otherwise interfere with the online activity of our customers, and we are transparent with our customers regarding the performance of our service." Charter Comments at 2, WC Docket No. 17-108.	• "Many [internal] documents indicate that, despite some instances of [BEGIN HIGHLY CONF. INFO.] [END HIGHLY CONF. INFO.], New Charter would have an incentive to harm OVDs that could serve as substitutes for some or all of its video products. For instance, the record indicates that the Applicants have taken steps to [BEGIN HIGHLY CONF. INFO.] [END HIGHLY CONF. INFO.]." *Charter/TWC Order*, 31 FCC Rcd. at 6344 ¶ 42. • "In numerous internal documents, Defendants show a keen awareness of the competitive threat that OVDs pose. In fact, a TWC presentation from February 2014 illustrated the threat posed by such emerging online competitors as a meteor speeding towards earth." Complaint, United States v. Charter Communications, et al., Case No. 1-16-cv-00759-RCL, 11-12 ¶ 27 (D.D.C. Apr. 25, 2016) ("*Charter/TWC DOJ Complaint*").

Illustration used in DOJ Complaint[38]

Each of the Opposing Parties claimed and continues to claim that they lack any incentive or ability to harm edge providers. In each case, the Commission and DOJ flatly rejected their claims and imposed conditions to protect edge providers and consumers. Yet Opposing Parties repeat these claims in the current proceeding.[39] The economic analysis submitted in this proceeding by Opposing Parties demonstrates the importance of having the hard factual evidence, and not just the Commission's public conclusions, in hand. Both AT&T and Comcast submitted economist declarations arguing against the continued use of Title II. Each discussed the likely threat of action by the broadband providers of the kind that the current rules are designed to prevent. For example, Comcast's economic expert asserts that "there is no evidence that BIAS providers can profitably break the Open

[38] *Charter/TWC DOJ Complaint* at 11-12 ¶ 27.

[39] *See* Exhibit A.

Internet Rules," that "there is no evidence that BIAS providers did, can, or would harm the Internet ecosystem," that the "conditions for vertical dominance have never been very clearly established" and that "even having monopoly access to the BIAS customer may not give any leverage to the BIAS provider."[40] AT&T's economic experts assert that "[t]here are no 'market failures' here that need to be addressed by common carrier regulation," that concerns about gatekeeper power and "externalities" are "not economically sound," that it might "reasonably be expected that an owned or sponsored network would not be subject to market failure" because "harming edge content providers directly impacts the demand for broadband services" and thus broadband providers "have strong incentives to be certain there is plenty of content to drive demand for their infrastructure."[41]

This line of economic reasoning is important. The broadband providers have long contended that online content is a complementary product to their residential broadband service and that, therefore, they have neither incentive nor even the ability to curb such content. The power of that assertion as a matter of economic theory, however, is convincingly displaced by the single source of authority to which theory must bow: the actual facts, derived from the actual thinking, plans, and actions of the broadband providers themselves. And these facts demonstrate again and again and again, as set forth in the table below and in Exhibit A that the broadband providers, in fact, have the incentive and the ability to do precisely what they assert they would never—could never—do. That is why the Commission has repeatedly found in the past that these providers have the incentive

[40] Comments of Comcast Corporation, WC Docket No. 17-108, at Appendix C, ii, iii, 7, 15 (July 17, 2017).

[41] AT&T Economists Declaration at 11, 35.

and ability to discriminate. To ignore those past conclusions and the evidence supporting them is illogical. Without these facts, the Commission would lack the anchor necessary to render a decision that is neither arbitrary nor capricious.

Opposing Parties present a false list of hypotheticals where the Commission becomes bogged down in administrative disputes and distracted by outdated and irrelevant information and they raise the specter of "millions" of people having access to their information, leading to a heightened risk of the information becoming public. If they were right, then the same should have happened in the previous transaction proceedings, all of which attracted significant public attention and hundreds of thousands of comments.[42] And yet Opposing Parties make no claim that any of their information from those proceedings was misused or made public despite the highly public nature of those proceedings. Why were there not? Because the Commission limited the access to the most sensitive information under a protective order to certain outside counsel and consultants and then only for outside counsel and consultants for entities that had filed a petition to deny or material comments in the proceedings.[43] Consequently, the protective orders

[42] Based on ECFS, until the Commission issued its orders, in the Charter/TWC merger, 169,626 comments were filed. In the Comcast/TWC merger, 127,342 comments were filed. In the AT&T/DIRECTV merger, 14,916 comments were filed. In the Comcast/NBCU merger, 33,566 comments were filed.

[43] *See, e.g.*, Applications of AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, *Joint Protective Order*, 29 FCC Rcd. 6047, 6050-51 ¶ 7 (2014). Additional protection is provided by the requesting party requiring an acknowledgement and the submitting party having the opportunity to object to parties receiving access. *Id*.

provided that a "participant" who wanted access needed to have filed a petition to deny or a material comment.[44]

INCOMPAS fully supports using similar standards here. Interested parties who have filed a material comment in this proceeding should be allowed to apply to review the confidential and highly confidential information requested by INCOMPAS in its Motion.[45] This will be a relatively small pool of eligible participants and we agree with AT&T that it will be helpful that such participants have "substantial experience protecting confidential information obtained pursuant to protective orders" or the equivalent.[46]

Further proving that the objections are based on hyperbole, Charter and Comcast overstate how much information would be brought into this docket and mischaracterize what INCOMPAS actually requested.[47] It is not the number of pages but the burden of producing them that the Commission should consider. INCOMPAS does not ask Opposing Parties or the Commission to create new information. It asks them to add existing information to the record. For example, prior Commission orders should be straightforward to produce. And Opposing Parties have already provided requested 4(c) information, so further reproduction is unlikely to be burdensome.

Of course, a decision that a single category should not be included would not by itself justify rejection of any other category. Each category is severable. But INCOMPAS

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[44] *Id*. at 6048 ¶ 2.

[45] Motion at 9-10.

[46] AT&T Opposition at 18. The comments would need to have been filed before the July 17, 2017 deadline. By INCOMPAS's estimate, there are roughly 270 participants at most who submitted detailed and material comments that could be eligible to apply for access.

[47] *See, e.g.*, Charter Opposition at 5; Comcast Opposition at 9.

believes that all four categories should be brought in, as each is necessary and provides the crucial link in the chain of inferences that the Commission will need to decide upon in determining whether to reclassify broadband providers or retain the current rules. These four categories are necessary because they answer the ultimate question in this proceeding: should the FCC trust the broadband providers to not act on their incentives and abilities to harm consumers and against edge providers? Whether this material was or was not needed in prior open Internet proceedings is now irrelevant.[48] Today, the Commission seems poised to find that, despite the reasoning adopted in the three previous transaction proceedings, the threats posed by the broadband providers are hypothetical and theoretical[49] or otherwise non-existent.[50] If the Commission goes down this road, it would be necessary for the Commission to be able to demonstrate why its conclusions in the previous merger orders were wrong, especially when the Commission in at least one merger relied upon the existence of the open Internet rules as it considered what conditions to place upon[51] the merged entity, demonstrating the extent to which the

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[48] Of course, opining on the adequacy of the evidence on which the *2015 Open Internet Order* was based while dismissing evidence on which concurrent orders were based—e.g., AT&T/DIRECTV; Charter/TWC—as too old would itself be considered arbitrary and capricious.

[49] *NPRM*, 32 FCC Rcd. at 4452 ¶ 50, 4460 ¶¶ 76-78.

[50] *See, e.g.*, *NPRM*, 32 FCC Rcd. at 4460 ¶ 77 ("How have marketplace developments impacted the incentive and ability, *if any*, of broadband Internet access service providers to engage in conduct that is contrary to the four Internet Freedoms?") (emphasis added).

[51] *See Flyers Rights Education Fund, Inc. v. FAA*, No. 16-1101, 13 (D.C. Cir. July 28, 2017) ("Indeed, we have long held that, when 'the data relied on by [an agency] in reaching its decision is not included in the administrative record and is not disclosed to the court[,]' we cannot 'determine whether the final agency decision reflects the rational outcome of the agency's consideration of all relevant factors[.]'") (quoting *United States Lines, Inc. v. Federal Maritime Commission*, 584 F.2d 519, 533 (D.C. Cir. 1978)).

Commission has believed that transaction reviews and the open Internet proceedings are intertwined.[52]

Next, the Opposing Parties, having realized that their arguments fail both legally and factually, suddenly decide that this information, which they claim is highly sensitive and would be ruinous to them if seen by anybody, is outdated.[53] This is not true but, in any case, at most the objection goes to how much weight the Commission should give to the evidence, not to whether it should be admitted into the record. The broadband providers should be free to argue that the market has changed so much that the information is outdated, but, of course, that contention can only be assessed by understanding the conditions that are asserted to have changed. Yet this consideration can only be made by looking at all available evidence, not just cherry-picked evidence and generalized theory submitted by the broadband providers in this proceeding. [54] The objecting parties have the

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[52] Applications of AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 30 FCC Rcd. 9131, 9214 ¶ 218 (2015) ("We believe that in this particular case the protections in the *2015 Open Internet Order*, coupled with certain conditions we impose today, will best address any potential for anticompetitive activity by the combined entity in its interconnection practices that affects OVDs."). Indeed, the relationship between transaction proceedings and Net Neutrality protections stretches back at least to 2005. *2015 Open Internet Order*, 30 FCC Rcd. at 5620 ¶ 65.

[53] AT&T Opposition at 12 ("In fact, the confidential information submitted in the license transfer adjudications is significantly outdated. . . .").

[54] And, of course, the earlier merger conclusions need to be understood in their full context, which is why the particular factual detail is so important. So, for example, AT&T argues that information about its incentive to apply data caps on fixed broadband connections is irrelevant because it no longer uses such data caps. AT&T Opposition at 12-13. But that is like saying the earlier Commission order was issued on a Tuesday and this one would be scheduled for a Thursday. If a broadband provider has the incentive to harm OVDs, then it has multiples means of doing so apart from broadband data caps and these additional mechanisms include such things as interconnection arrangements, paid prioritization, or other forms of discriminatory conduct.

power to choose carefully what information they put into the record about their investments and business plans that they supposedly abandoned because of Title II classification,[55] yet they believe the information that they submitted to the Commission previously in their merger requests that convinced the Commission that the mergers posed grave competitive risks should not be considered.[56] To ignore the requested information is to ignore necessary evidence that the Commission must rely upon in deciding whether to re-reclassify broadband providers. Opposing Parties have provided a roadmap to reversible error.

Opposing Parties also claim that this information is one-sided and presents a biased picture.[57] But INCOMPAS is not barring additional investigation that the Commission may wish to conduct. If the broadband providers think there is more information that is necessary, then they should request that the Commission seek it. Contrary to Opposing Parties' arguments, the antidote to less information is not the absence of information, but more information.

Finally, Opposing Parties claim that bringing in this information would "substantially chill[] the voluntary disclosure of information to the Commission for years to

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[55] *See, e.g.*, Charter Comments, WC Docket No. 17-108, at 11 (July 17, 2016).

[56] *See* Exhibit A.

[57] AT&T Opposition at 15 ("INCOMPAS'[s] request is also unsustainably one-sided and self-serving. The confidential information INCOMPAS seeks was collected from just three industry participants: AT&T, Charter, and Comcast."). But these participants represent over 65% of the industry in terms of number of subscribers, and the information collected could be relied upon, as the Commission has done. And as noted above, it is information that goes directly to the veracity of current representations.

come."[58] This is pure conjecture based on an alternative reality where companies decline to enter into multibillion dollar mergers out of a generalized anxiety that one day in the future, some of their information may be used again in another proceeding but subject to the same protections as before. This fear only makes sense if one thinks that the Commission will bring in all of the confidential information submitted in the merger proceedings and throw it open to everyone who requests it with no provisions for its protection. But INCOMPAS has requested that the Commission bring in a limited subset of information and apply the exact same protections afforded previously.

IV. OPPOSING PARTIES MISREPRESENT INCOMPAS'S MOTION

Opposing Parties' allegations that INCOMPAS may be violating the protective orders are inaccurate.[59] INCOMPAS cites publicly available information to demonstrate that the Commission has expressed concerns about applicants' actions relevant to this proceeding, based on the *public* references to the existence (and sometimes the date or the type) of redacted materials.[60] INCOMPAS fully understands the scope of the protective orders. That is why it has filed its Motion pursuant to FCC rules asking the Commission to place this information in the record of this proceeding.[61]

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[58] Charter Opposition at 6.

[59] Comcast Opposition at 4; AT&T Opposition at 1-2.

[60] *See* Motion at 5 ("The NPRM suggests that the concerns raised in the *2015 Open Internet Order* were 'hypothetical' or 'theoretical.' Yet, important and strong evidence for the risk of these harms is found in the internal documents from the merger proceedings, as the Commission repeatedly recognized when it cited discrepancies between what the companies said publicly and what their internal documents revealed.") (citation omitted).

[61] *See* 47 C.F.R. § 1.41. AT&T's argument that INCOMPAS improperly filed its Motion solely in the above-captioned proceeding is baseless. AT&T Opposition at 1 n.1. AT&T fails to cite any rule or precedent for its claim because there is none. And INCOMPAS filed the Motion

Additionally, Opposing Parties misstate the precedent that INCOMPAS cited. The precedent demonstrates that the Commission has the power to expand or modify protective orders outside of their original proceeding. Opposing Parties do not contest that; instead, they contest whether it would be wise to do so, largely by conjecturing nightmare scenarios. As INCOMPAS has demonstrated, this will not happen and it is not only wise but necessary to include this information in the record.

V. CONCLUSION

The Commission should promptly convene a meeting of parties interested in this issue to discuss how appropriate procedures can be put in place to meet the legitimate concerns of the broadband providers that the confidential and highly confidential information remain protected. That meeting could and should materialize quickly, as it is vital for the Commission to have a full understanding of how the process could be shaped adequately in the face of the overbroad arguments advanced by Opposing Parties.[62] Like Opposing Parties, INCOMPAS believes it is imperative that the confidentiality of the information requested be protected. Such a meeting, which could be held as early as the next business day, would be an important way forward.

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in the docket in which it is asking the Commission to act. Indeed, the broadband providers' own filings that day demonstrate the necessity of the information requested and show the timeliness of filing this Motion at a time when the Commission would have the ability to contrast broadband providers' current claims against the conclusions of the prior transaction orders.

[62] For example, the unredacted orders could be released as soon as confidentiality safeguards are enacted. Further releases could be staggered.

Respectfully submitted,

/s/

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August 3, 2017

EXHIBIT A

Statements made in FCC merger application that entity has no ability/incentive to harm consumers/competitors	Statements made in Restoring Internet Freedom Docket (WC Docket No. 17-108) that entity has no ability/incentive to harm consumers/ competitors	FCC/DOJ findings that entity has ability/incentive to harm consumers/competitors
Comcast/NBCU		
• Application at 122: "The combined company will not have the ability or incentive to benefit its distribution businesses by discriminating against rival online video distributors." • Application at 123: "The combined company would likewise have no ability or incentive to pursue a distribution-foreclosure strategy with respect to online video distribution." • Application at 126: "The combined company would also lack incentive to pursue [a high-speed Internet] foreclosure strategy."	• Comcast Comments at 63: "Comcast has long pledged not to engage in blocking, throttling, or anticompetitive forms of paid prioritization—as have many other BIAS providers and trade associations representing the broadband industry. • Comcast Comments at 63: "As Comcast explained in its 2014 comments, '[i]f a provider were to block or degrade Internet applications or content, the provider would incur substantial subscriber losses and reputational harm.'"	• *Comcast/NBCU Order*, 26 FCC Rcd. at 4269 ¶ 78, 4269 ¶ 80: "New OVD services and new deals are announced seemingly daily. Comcast has an incentive to prevent these services from developing to compete with it and to hinder the competition from those that do develop. . . . [t]he fact that most OVD services do not currently offer consumers all popular linear channels does not mean that they cannot and will not do so in the near future." (citing redacted information in footnotes 172 and 174) • *Comcast/NBCU Order*, 26 FCC Rcd. at 4270 ¶ 81: "[E]ven today OVDs may provide some competition for Comcast and affect the prices it charges consumers. For example, an OVD that rents or sells movies competes against Comcast's pay-per-view movie service and, hence, competes with Comcast for revenue. **[REDACTED]** Comcast therefore has an incentive to deny that OVD access to NBCU content, including movies distributed by Universal Studios. If consumers have a choice for some of Comcast's services at a lower price, Comcast may be forced to lower its price in order to keep those customers." (citing redacted information in footnotes 177 and 178)

		• *Comcast/NBCU Order*, 26 FCC Rcd. at 4262-63 ¶ 61: "We find that, as a vertically integrated company, Comcast will have the incentive and ability to hinder competition from other OVDs, both traditional MVPDs and standalone OVDs, through a variety of anticompetitive strategies. These strategies include, among others: (1) restricting access to or raising the price of affiliated online content; (2) blocking, degrading, or otherwise violating open Internet principles with respect to the delivery of unaffiliated online video to Comcast broadband subscribers; and (3) using Comcast set-top boxes to hinder the delivery of unaffiliated online video." • *Comcast/NBCU Order*, 26 FCC Rcd. at 4268 ¶ 78: "We conclude that Comcast-NBCU will have the incentive and ability to discriminate against, thwart the development of, or otherwise take anticompetitive actions against OVDs." • *Comcast/NBCU Order*, 26 FCC Rcd. at 4275 ¶ 93: "[W]e also identify particular transaction-related harms that arise from the increased risk that Comcast will engage in blocking or discrimination when transmitting network traffic over its broadband service. Specifically, we find that Comcast's acquisition of additional programming content that may be delivered via the Internet, or for which other providers' Internet-delivered content may be a substitute, will increase Comcast's incentive to discriminate against unaffiliated content and distributors in its exercise of control over consumers' broadband connections."

		• *Comcast/NBCU DOJ Complaint*, 21-22 ¶ 54: "Comcast has an incentive to encumber, through its control of the JV, the development of nascent distribution technologies and the business models that underlie them by denying OVDs access to NBCU content or substantially increasing the cost of obtaining such content. . . . Comcast's incentives and ability to raise the cost of or deny NBCU programming to its distribution rivals, especially OVDs, will lessen competition in video programming distribution."
AT&T/DIRECTV		
• Application at 40: "In addition to improving broadband access for millions of Americans, the broadband expansion also will benefit OTT providers like Netflix, Amazon, Google, and Hulu, which depend on consumers having access to quality broadband connections."	• AT&T Comments at 48: "In short, there is no need for regulatory oversight of [interconnection]. . . . [I]nterconnection concerns cannot plausibly justify retaining Title II regulation as a policy matter because they lack any empirical basis. To the contrary, the Commission's abstract assertion of regulatory authority on the basis of Title II served only to distort this otherwise well-functioning market." • AT&T Comments at 21: "Because the *Title II Order* could cite no credible evidence of any relevant market failure, it resorted to abstract economic speculation about market conditions that might theoretically imperil Internet openness someday."	• *AT&T/DIRECTV Order*, 30 FCC Rcd. at 9210 ¶ 210: "We find that as the combined entity expands its online offerings, it will have an increased incentive to limit subscriber demand for competitors' online video content, including through data caps that discriminate against third-party content by exempting its own content from the data cap. Indeed, AT&T's internal documents indicate that **[BEGIN HIGHLY CONF. INFO.] [END HIGHLY CONF. INFO.]**." • *AT&T/DIRECTV Order*, 30 FCC Rcd. at 9211 ¶ 213: "We find that the transaction will increase the combined entity's incentive to discriminate against unaffiliated OVDs and online video programming to protect both its traditional video services and its OVD services." • *AT&T/DIRECTV Order*, 30 FCC Rcd. at 9248 ¶ 304: "[t]he Applicants' OVD services creates an incentive to limit competition from competing OVD services. We also note that **[BEGIN HIGHLY**

		CONF. INFO.] [END HIGHLY CONF. INFO.]."
Charter/TWC		
• Application at 43: "The video distribution marketplace is competitive and dynamic for both MVPDs and OVDs, and New Charter will have neither the incentive nor the ability to interfere with it." • Application at 44: "New Charter will lack the ability to adversely impact OVDs' abilities to compete . . . as well as the incentive to do so" • Application at 45: "There also is no reason for concern about national aggregation of broadband because New Charter (just as Applicants today) will have no gatekeeping role with respect to the online content we make available to consumers." • Application at 46: "In any event, any effort to foreclose OVDs would be directly contrary to our clear economic interest in expanding subscribership to our broadband network." • Application at 47: "Nor will our position in the top DMAs allow us to foreclose OVDs if that were	• Charter Comments at 1: "Without the need for heavy-handed regulation, ISPs recognized their customers' fundamental interest in an open internet and fostered the development of this open ecosystem, which has allowed consumers to access the lawful content of their choice and encouraged disruptive development by edge providers and app developers." • Charter Comments at 2: "Consistent with Charter's pro-customer and pro-broadband approach, we have long put the principles of an open internet into practice in our own business. We do not block, throttle, or otherwise interfere with the online activity of our customers, and we are transparent with our customers regarding the performance of our service."	• *Charter/TWC Order*, 31 FCC Rcd. at 6343 ¶ 39: "We find that New Charter will have greater incentives to harm those OVDs that serve as a substitute for, and therefore compete with, New Charter's video services." • *Charter/TWC Order*, 31 FCC Rcd. at 6344 ¶ 42: "The Applicants' internal documents support our conclusion. Many documents indicate that, despite some instances of **[BEGIN HIGHLY CONF. INFO.] [END HIGHLY CONF. INFO.]**, New Charter would have an incentive to harm OVDs that could serve as substitutes for some or all of its video products. For instance, the record indicates that the Applicants have taken steps to **[BEGIN HIGHLY CONF. INFO.] [END HIGHLY CONF. INFO.]**." • *Charter/TWC Order*, 31 FCC Rcd. at 6344 ¶ 48: "[W]e conclude that New Charter could use its increased size to harm consumers' choices in the market for video services by unilaterally discriminating against potential video competitors (such as OVDs) through the use of anticompetitive retail terms for residential BIAS, upon which OVDs rely to reach current and potential customers." • *Charter/TWC Order*, 31 FCC Rcd. at 6361 ¶ 71 n. 213: "The record indicates that edge providers such as OVDs represent a common threat to both New Charter and the entire cable industry. . . . According to internal Charter documents, **[BEGIN HIGHLY CONF. INFO.]** *** **[[END HIGHLY CONF.**

our goal. . . . And, as a practical matter, we could not withhold programming content from OVDs to increase the attractiveness of our own video services. We will not have national programming and thus will lack the ability to harm OVDs by withholding or increasing costs for our programming." • Application at 48: "New Charter also has no incentive to harm OVDs."		**INFO.]**. *See* CHR2-DOJ-00000246437 at 4, **[BEGIN HIGHLY CONF. INFO.]** *** **[END HIGHLY CONF. INFO.]**." • *Charter/TWC Order*, 31 FCC Rcd. at 6365-66 ¶ 80: "We are unconvinced by Charter's arguments that it has no incentive to harm OVDs through the use of data caps or [usage-based pricing]. We rejected this argument in our discussion above and find that New Charter's incentive to retain MVPD subscribers is quite strong. Internal Charter documents detailing Charter's anxiety regarding OTT substitutes for MVPD services evidence Charter's incentives. For example, Charter's internal documents predict **[BEGIN HIGHLY CONF. INFO.]** *** **[END HIGHLY CONF. INFO.]**. Charter's internal documents appear to indicate that the company's position on usage-based billing is subject to change **[BEGIN HIGHLY CONF. INFO.]**** **[END HIGHLY CONF. INFO.]**. For example, a 2012 PowerPoint presentation **[BEGIN HIGHLY CONF. INFO.]** *** **[END HIGHLY CONF. INFO.]**. While a 2010 executive level presentation **[BEGIN HIGHLY CONF. INFO.]** *** **[END HIGHLY CONF. INFO.]**. However, **[BEGIN HIGHLY CONF. INFO.]** *** **[END HIGHLY CONF. INFO.]**. A 2014 document discusses **[BEGIN HIGHLY CONF. INFO.]** *** **[END HIGHLY CONF. INFO.]**. Again, the document notes that **[BEGIN HIGHLY CONF. INFO.]** *** **[END HIGHLY CONF. INFO.]**. Therefore, **[BEGIN HIGHLY CONF. INFO.]** *** **[END HIGHLY CONF. INFO.]**." • *Charter/TWC Order*, 31 FCC Rcd. at 6386 ¶ 122: "We previously concluded that New Charter will

		have a general incentive to discriminate against OVDs because they compete with New Charter's affiliated video services. Here, we further find that New Charter will have the ability and incentive to discriminate against OVDs via the interconnection market." • *Charter/TWC DOJ Complaint*, 4 ¶ 7 "With more to gain from imposing ADMs and other contractual restrictions and with greater bargaining leverage with programmers to insist on such provisions, New Charter will be well-positioned to restrain continued OVD growth by limiting or foreclosing OVD access to the video content that is vital to their competitiveness." • *Charter/TWC DOJ Complaint*, 13 ¶ 30: "In addition, New Charter will have greater incentive to engage in conduct designed to make OVDs less competitive because the merged firm will be significantly larger than any of the Defendants individually." • *Charter/TWC DOJ Complaint*, 11-12 ¶ 27: "In numerous internal documents, Defendants show a keen awareness of the competitive threat that OVDs pose. In fact, a TWC presentation from February 2014 illustrated the threat posed by such emerging online competitors as a meteor speeding towards earth."